COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2020-P-0449

Middlesex, ss.

JOSEPH A. CURTATONE, Appellant

v.

BARSTOOL SPORTS and KIRK MINIHANE, Appellees

On Appeal From A Judgment Of
The Middlesex Superior Court

APPELLANT'S BRIEF FOR JOSEPH A. CURTATONE

Date: 07/20/2020

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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STATEMENT OF ISSUES

I. Whether the Defendants violated the Massachusetts Wiretap Statute, M.G.L. c. 272, § 99, by procuring the Plaintiff's consent to the recording of a conversation by fraud through Defendant Kirk Minihane's intentional and purposeful false identification of himself with the specific knowledge that the Plaintiff otherwise would not have talked with him, recorded or not?

STATEMENT OF THE CASE

On June 17, 2019, Plaintiff Joseph A. Curtatone ("Curtatone") filed a complaint against the Defendants Kirk Minihane ("Minihane") and Barstool Sports that asserted a count for violation of M.G.L. c. 272, § 99, the Massachusetts Wiretapping Statute. RA 5, 8-12.[1]

On August 8, 2019, the Defendants filed a motion to dismiss. RA 6, 13-14. The Plaintiff opposed. RA 6, 23-35.

Following a hearing on October 23, 2019, the Court (Hogan, J.) took the matter under advisement. RA 6, 70-85.

[1] The Plaintiff refers to the Record Appendix by "RA" followed by a page number.

On January 16, 2020, the Court issued a Memorandum and Order on the Defendants' Motion to Dismiss, allowing the Motion. RA 6, 64-68. Judgment entered on January 17, 2020. RA 6. The Plaintiff filed a notice of appeal. RA 6, 69.

STATEMENT OF FACTS

The Plaintiff's Complaint asserts the following facts that, for purposes of this motion, must be construed in the Plaintiff's favor and taken as true:[2]

Plaintiff Curtatone is an individual who resides in the City of Somerville, Massachusetts and at all times relative was and is the Mayor of the City of Somerville. RA 8. Defendant, Barstool Sports, Inc. ("Barstool") is a domestic corporation doing business in the Commonwealth with a principal place of business located at 333 7th Avenue, New York City, New York. RA 8. Defendant Minihane is an individual who resides in Lexington, Massachusetts. At all times relative to the allegations contained in this Complaint, Minihane was employed by Barstool Sports. RA 8.

[2] In reviewing motions to dismiss, "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true." Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407 (1995); Warner-Lambert Co. v. Execuquest Corp., 427 Mass. 46, 47 (1998).

Barstool is a blog, whose President is David Portnoy ("Portnoy"). Portnoy is known as "El Pres" and who enjoys a reputation for publishing crass content on Barstool and using demeaning and derogatory language when referring to women. RA 8.

On May 29, 2019, *Boston Herald* reporter Jessica Heslam ("Heslam") authored an article and published a tweet criticizing the Boston Bruins and National Hockey League for their association with Barstool.[3] RA 9. Specifically, Barstool was promoted on the "fan towels" distributed at TD Garden ahead of Game 2 of the Stanley Cup Finals. Heslam, and her sources, criticized this "partnership." In her article, Heslam reported that she had spoken with a female college student who spent time protesting Barstool while a student at Boston University. The identified source claimed that she and others spent time "trying to stop men from carrying unconscious young women out of Barstool Sports Blackout parties in Boston." RA 9.

Boston Herald Bruins beat reporter Marisa Ingemi questioned the partnership to the Bruins' PR staff, requesting comment on the team's decision to partner

[3] https://www.bostonherald.com/2019/05/29/the-nfl-broomed-barstools-david-portnoy-so-should-the-bruins/.

with Barstool Sports on the promotional towels. RA 9. Other media outlets have called out Barstool for its "well-documented history of misogyny, racism, and harassment."[4] RA 9. It also is well known that the National Football League has banned Portnoy from attending certain league-affiliated affairs. RA 9.

On May 31, 2019, Mayor Curtatone issued a statement condemning Barstool for its treatment of women and minorities. RA 9. Curtatone wrote, "As a fairly rabid sports fan one of the more regrettable things I've seen is the attempt to disguise misogyny, racism & general right-wing lunacy under a 'sports' heading. Our sports teams & local sports fans need to push back to stress that's not us. @NHLBruins #mapoli." RA 9.

In response to Mayor Curtatone's expressing his opinion, Portnoy launched a vitriolic personal attack on Curtatone and his family. RA 9. Portnoy posted on Barstool accusing Curtatone of being a "professional criminal."[5] RA 10. Portnoy stated that "they"

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[4] https://thinkprogress.org/barstool-sports-sexism-30cee73eccc4/.

[5] https://www.barstoolsports.com/boston/the-mayor-of-somerville-joe-curtatone-who-appears-to-be-a-legitimate-criminal-took-a-shot-at-barstool-sports-over-towelgate.

(Curtatone's family) "rape, extort, stab and arson [sic]." RA 10. Portnoy stated that Mayor Curtatone "is a legitimate criminal." RA 10.

Minihane determined that he would try to interview Curtatone on behalf of Barstool. RA 10. Minihane claims that he attempted to get an interview using his real name and was refused. RA 10. Mayor Curtatone was never aware of any request from Minihane for an interview. RA 10.

Minihane decided to impersonate a *Boston Globe* reporter named Kevin Cullen in order to obtain an interview. RA 10. Minihane contacted employees of the City of Somerville and identified himself as Kevin Cullen. RA 10. On June 5, 2019, Minihane spoke to a Public Information Officer for the City of Somerville, identified himself as *Boston Globe* reporter Kevin Cullen, and asked to interview Mayor Curtatone. RA 10. In response to the request by a person who Mayor Curtatone believed to be Kevin Cullen, Mayor Curtatone agreed to the telephone interview. RA 10.

On June 6, 2019, Minihane, while in Massachusetts, conducted the telephone interview of Mayor Curtatone while impersonating Kevin Cullen. RA 10. Minihane went so far as to alter his normal

method of speaking to sound like Kevin Cullen. RA 10. Minihane is and was aware that he needed to obtain permission from Curtatone to audio record their conversation. RA 10. Minihane, posing as Cullen, asked for Mayor Curtatone's consent to record him during the interview by stating "I'm just going to record this so we have it, is that good?" RA 10. Mayor Curtatone, believing that he was speaking to Kevin Cullen, a representative of a legitimate news organization, *The Boston Globe*, responded "no problem." RA 10.

Minihane obtained Mayor Curtatone's "consent" to the recording through fraud. RA 11. Minihane caused his end of his conversation with Mayor Curtatone to be both audio and video recorded, and audio recorded both ends of the conversation. RA 11. Minihane bragged on the recording about having lied about his identity. RA 11. Barstool placed the recording of Curtatone on its blog. RA 11. Minihane, acting as an agent of Barstool Sports, published the illegally recorded interview on Barstool.[6] RA 11.

[6] https://www.barstoolsports.com/video/1333685/kirk-minihane-aka-kevin-cullen-from-the-boston-globe-interviews-somerville-mayor-joe-curtatone.

SUMMARY OF THE ARGUMENT

Massachusetts is a two-party consent statute for purposes of its Wiretap Statute, meaning that both parties must consent to the recording of telephone calls for the recording to be legal except in limited circumstances that have no application here. (pp. 17-20). The Massachusetts statute is to protect citizens from grave dangers to their privacy rights. (pp. 17-18). The focus thus is on the individual's right to consent to being recorded. (p. 18). Consent is key under the statute and consent cannot be treated cavalierly. (pp. 19-21).

Consent under the statute must be "actual consent" and not just constructive. (pp. 21-22). Consent means "a concurrence of the minds." (p. 22). It is intended to be an act of reason and deliberation. (p. 22). Consent can be express or implicit – but it is always required. Implied consent is required even under an "actual knowledge" of the recording analysis, and it is dependent on the surrounding circumstances in a given situation. (pp. 22-24).

Consent is an act affected by fraud, duress and mistake. (pp. 25-26). Consent obtained by deception is

no consent at all. (pp. 25-26). This was the case here.

There was no valid consent to Minihane's recording of the telephone conversation – express or implied. (pp. 26-28). Minihane intentionally misrepresented his identity and, concomitantly, his purpose in speaking and recording Curtatone for the express aim of inducing Curtatone to agree to something he would not have otherwise agreed to or participated in. (pp. 26-28). These actions vitiated any consent to recording - express or implied. (pp. 26-28).

Minihane misrepresented himself as Cullen knowing that Curtatone would never otherwise speak with him, let alone let him record him. (pp. 29-30). Curtatone authorized only one person- Kevin Cullen – to hear the conversation and record it. (p. 30). Also, Minihane's fraud deprived Curtatone of the meaningful opportunity under the statute to leave a conversation that he did not wish to participate in and/or have recorded.

In any event, the fact remains that Minihane's recording was "surreptitious" or "secret" under any meaning of that term. (pp. 31-32). He obtained that recording "in secret or by improper means" …

"characterized by fraud or misrepresentation of the truth," having taken deliberate and extreme measures to conceal his identity. (pp. 31-32).

At a minimum, Minihane did "secretly hear" Curtatone's conversation, which, under principles of statutory construction, is an independent violation of the Wiretap Statute. (pp. 33-34).

ARGUMENT

A. Standard of Review

This Court reviews the allowance of a motion to dismiss *de novo*. Galiastro v. Mortgage Elec. Registr. Sys., Inc., 467 Mass. 160, 164 (2014). In so doing, it accepts as true the facts alleged in the plaintiffs' complaint as well as any favorable inferences that reasonably can be drawn from them. Id.; Polay v. McMahon, 468 Mass. 379, 382 (2014).

B. The Complaint States a Claim for Violation of the Massachusetts Wiretap Statute

The Complaint asserts a claim against the Defendants under the Massachusetts Wiretap Statute, M.G.L. c. 272, § 99.

1. The Wiretap Statute

The Wiretap Statute has its antecedents in Chapter 558 of the Statutes of 1920. One-party consent

had been the operative standard in Massachusetts prior to a 1968 amendment to G.L. c. 272, § 99. See G.L. c. 272, § 99, as appearing in St. 1959, c. 449, § 1 (whoever … secretly or without the consent of either a sender or receiver ….") It was rewritten again in 1969. Since then, there have been minor and, for these purposes, irrelevant revisions in 1986, 1993, and 1998. The statute now provides that:

> any person who willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one-half years, or both so fined and given one such imprisonment. …

G.L. c. 272, § 99(C)(1). Subsection Q provides a civil remedy for "[a]ny aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this statute."

The statute defines "interception" as:

> to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person *other*

> *than a person given prior authority by all parties to such communication*; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to the communication or has been given prior authorization to record or transmit the communication by such party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

Id. § 99(B)(4)(emphasis added).

The statute defines "contents" as "any information concerning the identity of the parties to such communication or the existence, contents, substance, purport, or meaning of that communication." M.G.L. c. 272, § 99(B)(5) (emphasis added). It defines "person" as "any individual, partnership, association…." Id., § 99(B)(13).

2. Massachusetts Is a Two-Party Consent State

Unlike many of its counterparts in other states, or the Federal Wiretap Statute, the Massachusetts Wiretap Statute, G.L. c. 272, § 99, requires both parties to consent to the recording of telephone calls for the recording to be legal. Commonwealth v. Hyde, 434 Mass. 594, 599 (2001). While the statute contains a "one-party consent" exception for law enforcement officials investigating certain "designated offenses,"

Massachusetts is -- where civilians are concerned - a two-party consent law, in that consent to an otherwise prohibited interception must be given by "all parties to [the] communication." Marquis v. Google, Inc., No. 11-2808, 2015 WL 13037257, at *6 (Mass.Super. Feb. 13, 2015). This distinguishes the Massachusetts law from the Federal Electronic Communications Privacy Act of 1986 (ECPA), Pub.L. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. § 2511 and elsewhere)[7] and most state wiretap statutes,[8] which permit interceptions with the consent of just one party. Marquis, supra.

Indeed, Massachusetts has one of the most restrictive two-party consent laws. The statute contains a preamble framing the goal of the law as protecting citizens from "grave dangers to … privacy" implicated by "unrestricted use of modern surveillance

[7] The ECPA permits interceptions by a civilian party "where such person is a party to the communication or where *one of the parties* to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d) (emphasis supplied).

[8] Thirty-eight states plus the District of Columbia have one-party consent laws, while eleven — California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Pennsylvania and Washington — have various sorts of two-party consent statutes. Marquis, supra at n.13.

technology." Rauvin Johl, Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default, 12 Harv. L. & Pol'y Rev. 177, 183–84 (2018). The statute's "all-party consent" rule adds an additional layer of protection to the private conversations of the Commonwealth's residents. As the Supreme Judicial Court has stated: "It is apparent from the preamble that the legislative focus was on the protection of privacy rights…." Commonwealth. v. Gordon, 422 Mass. 816 (1996).

Indeed, the rationale for adopting an all-party consent rule is on individual liberty as reflected through an individual's consent to being recorded. This rationale protects privacy in the sense that it aids the control each participant should have over the preservation and distribution of his own speech. See Tracer, J., Public Officials, Public Duties, Public Fora: Crafting an Exception to the All-Party Consent Requirement, 68 N.Y.U. Ann. Surv. Am. L. 125, 141 (2012). The privacy being protected is that of the autonomous individual. Id. To overcome this privacy/autonomy rationale, any exception to the all-party consent rule would, therefore, have to implicate only conversations in which the people being recorded

without consent either (1) have no ex ante privacy interests at stake or (2) have forfeited whatever privacy interests they do have because their consent can be implied even if it was not granted explicitly. Id.

a. The Statute Permits Only A Person Given "Prior Authority" To Hear or To Record a Conversation

"It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, *or commit them only to the sight of his friends*. Yates, J., in *Millar v. Taylor,* 4 Burr. 2303, 2379 (1769)." Warren & Brandeis, "The Right to Privacy," 4 Harv.L.Rev. 193, 198 n.2 (1890) (emphasis added). The Legislature has recognized the reasonableness, within limits, of every person's claim to control the flow of personal information. This recognition is found, not only in the Fair Information Practices Act, G.L. c. 66A (1984 ed.), and in the statutory right to privacy, G.L. c. 214, § 1B (1984 ed.), but also in the provisions of § 99 which outlaw electronic recording by ordinary citizens without the consent of *all* parties to a conversation. See G.L. c. 272, §§ 99(C)(1) and 99(B)(4). Thus, it has long been

thought reasonable to expect that what is supposedly said only to friends or close associates will not become otherwise indiscriminately known or "etched in stone" without the speaker's consent. See Commonwealth v. Blood, 400 Mass. 61, 69 (1987). In other words, consent is key and consent is not to be treated cavalierly given the statute's strong purpose to protect individual privacy by strictly limiting the occasions on which interception can lawfully take place. See Griggs-Ryan v. Smith, 904 F.2d 112, 117-18 (1st Cir. 1990) (consent "should not casually be inferred.")

b. Consent Under the Wiretap Statute

The Wiretap Statute does not define "consent" or "prior authority."[9] Where a statute does not define a term, this Court looks to the term's ordinary meaning, derived from, among other things, other legal contexts and dictionary definitions. See Smith v. United States, 508 U.S. 223, 228-29 (1993); Commonwealth v. Pagan, 445 Mass. 161, 166 (2005) ("When a statute does not define its words we give them their usual and

[9] In Flemmi v. Gunter, 410 F. Supp. 1361, 1368 n.4 (D. Mass. 1976), the Court equated the "authority" to record referenced in c. 272, § 99(B)(4) with the reference to "prior consent" in the federal statute.

accepted meanings, as long as these meanings are consistent with the statutory purpose…. We derive the words' usual and accepted meaning from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions.") The term "consent" is defined as:

> the act or result of reaching an accord; a concurrence of minds; … Consent is an act of reason and deliberation. A person who possesses and exercises sufficient mental capacity to make an intelligent decision demonstrates consent by performing an act recommended by another. Consent assumes a physical power to act and a reflective, determined, and unencumbered exertion of these powers. It is an act unaffected by fraud, duress, or sometimes even mistake, *when these factors are not the reason for the consent*.

https://legal-dictionary.thefreedictionary.com/consent (emphasis added).

Under the statute, consent may be explicit or implied, but it must be *actual* consent rather than constructive consent. Williams v. Poulos, 11 F.3d 271, 281-82 (1st Cir. 1993). The issue here is whether the Plaintiff can be said to have given his "actual" consent to the recording in the circumstances here – whether express or implied.

The Superior Court ruled that the question of whether a recording is authorized, i.e., consented to, "arises only if there is a finding that the

conversations were recorded secretly" and that permission to record an interview is not required if the interviewee has actual knowledge of the recording. RA 67, citing Commonwealth v. Jackson, 370 Mass. 502, 507 (1976) and Commonwealth v. Alleyne, 474 Mass. 771, 785 (2016). Jackson, however, confirms that the appropriate focus under the Wiretap Statute is on the claimant's "state of mind" and whether he or she "continue[s] to speak in apparent indifference to the consequences," Jackson, 370 Mass. at 507, – i.e., giving "implied consent" that the communications can be recorded. The Jackson decision thus necessarily speaks in terms of implicit consent in discussing whether a recording is "secret." See Jack I. Zalkind & Scott A. Fisher, Participant Eavesdropping - The All Party Consent Requirement, 22 Bos. B. J. 5, 8 (1978) ("[Jackson] in effect permits an 'interception' of a communication where the statements of the aggrieved party imply consent…").

As such, whether framed in terms of "actual knowledge" of a recording or "permission to record," there must be some form of two-party consent – whether explicit or implied. That is, consent of the parties is always required under the Wiretap Statute. Any

other interpretation would eviscerate the protections of M.G.L. c. 272, § 99, and effectively render it a one-person consent statute directly contrary to legislative intent.

In sum, even under the "actual knowledge of the recording" prong of the statute relied upon by the Superior Court, it remains that implied consent that necessarily underpins such knowledge is "consent in fact" - which is inferred from surrounding circumstances. "[I]mplied consent" depends on the "circumstances prevailing in a given situation" and "[t]he circumstances relevant to an implication of consent will vary from case to case…." Griggs-Ryan, 904 F.2d at 117; see Campiti v. Walonis, 611 F.2d 387, 393 (1st Cir. 1979)(implied consent — or the absence of it — may be deduced from "the circumstances prevailing" in a given situation). For example, implied consent can be shown when "informer went ahead with a call *after knowing what the law enforcement officers were about*." United States v. Bonanno, 487 F.2d 654, 658-59 (2d Cir. 1973) (emphasis added). This is key here. The one providing the consent – whether explicit or implied – at a minimum must know with whom they were speaking and what they "were about."

c. "Consent" or "Authority" Obtained By Fraud is Invalid

Under the common law "[c]onsent obtained by misrepresentation or fraud is invalid." See RESTATEMENT (SECOND) TORTS, § 330, comment g. That is, "fraud vitiates every act whether public or private, contracts, deeds, and judgments." The Amiable Isabella, 19 U.S. 1, 52 (1820).

"It is commonly said that fraud vitiates consent, or in another formulation: '[C]onsent obtained on the basis of deception is no consent at all.'" Gregory Klass, The Law of Deception: A Research Agenda, 89 U. Colo. L. Rev. 707, 731-32, n.70 (2018)(citation omitted). Klass states:

> It is something of an open question how best to explain the rule that fraud vitiates consent. One could begin with the principle that no one shall benefit from her own wrong--*nullus commodum capere potest de injuria sua propria*. The wrong in these cases is the defendant's deceptive conduct. The rule that fraud vitiate consent prevents the defendant from benefitting from that wrong. That result comports with our moral sense. And it disincentivizes engaging in the deception in the first place.

Id.[10]

[10] It is enough, Klass says, even if a person consenting to the conduct of another is induced to consent by "substantial mistake" and the mistake is known to the other person. Id., citing RESTATEMENT (SECOND) TORTS, § 892(b)(2).

Basically, under the law, if the person consenting to the conduct of another is induced to consent by fraud or a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the fraud or mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm. See 37 Mass. Prac., Tort Law § 10.2 (3d ed.). This was the case here.

2. There Was No Valid Consent Here – Express Or Implied

"The question of consent, either express or implied, may vary with the circumstances of the parties." United States v. Footman, 215 F.3d 145, 155 (1st Cir. 2000). There was no consent here – explicit or implied.

a. This Case Presents a Novel Issue Where Minihane Deliberately Misrepresented His Identity for the Express Purpose of Obtaining Curtatone's Consent to the Conversation and Recording

As noted, the Defendants have argued and the Superior Court ruled that a recording that is made with "actual knowledge of all the parties" is not an interception because it is not "secret." But, none of

the cases cited as support involve a situation where one party deliberately concealed his or her identity for the express purpose of deterring the other party from ending the conversation and/or refusing its being recorded.

Rather, the Defendants have relied primarily on criminal cases but, under the statute, with law enforcement, only one-party consent often is required. In any event, the Defendants, for example, cite to Commonwealth v. Boyarsky, 452 Mass. 700 (2008), in which the defendant knew that all calls he made from jail would be monitored and recorded yet he nonetheless made the telephone calls at issue. According to Boyarsky, the recording of those communications was not an "interception" under the Massachusetts Wiretap Statute because of that knowledge. However in this case, Curtatone did not consent to have all of his conversations recorded no matter whom he talked to. Thus, he had the right to know to whom he was speaking in making the decision as to whether he would consent

Meanwhile, in Commonwealth v. Alleyne, 474 Mass. 771 (2016), cited by the Superior Court, the defendant refused a recording of his custodial interrogation and

challenged the court's reference to the same at trial as a "right" to refuse the recording. The Court ruled a defendant need only be provided with notification of a recording of the interrogation and that permission to record is implied by any statements made after that notification. Id. at 785. A custodial interrogation, however, is an in-person encounter. In an in-person encounter, a defendant knows with whom they are speaking (i.e., a police officer) and, armed with that knowledge, they then determine whether they wish to speak and be recorded. This is in accord with Bonanno, discussed supra. Again, this simply was not the situation here.[11]

The particular circumstances of the case here must be considered. This Court should not countenance deliberate deception in order to obtain a recording of the Plaintiff's conversation. Such conduct is reprehensible and should not be tolerated.

[11] That statements made by a criminal defendant after being notified of the recording are deemed made with consent to that recording confirm that the concepts of knowledge of recording and consent are inextricably intertwined.

b. The Circumstances Here Show There Was No Valid Consent to the Recording of the Telephone Conversation

Telephone conversations are legitimate private activities. Defendant Minihane knowingly and intentionally infringed upon Curtatone's right to determine who would have the right to record his conversation. He falsely identified himself as Kevin Cullen from *The Boston Globe* in order to deceive Curtatone into engaging in this private activity – and went so far as to change his voice and to acknowledge a mutual acquaintance of Cullen and Curtatone – in order to purposely deceive Curtatone into believing he was speaking with Cullen. Curtatone permitted only Cullen to record. Minihane intentionally misrepresented his identity, and concomitantly his purpose, in speaking with and recording Mayor Curtatone with the precise aim of inducing Curtatone to agree to something to which he otherwise would not have agreed. Minihane made a false and material misrepresentation of fact that he intended Curtatone to rely upon, and which Curtatone did rely upon, in agreeing to the recording of the conversation.

Minihane's misrepresentation and fraud vitiated any consent to the recording – express or implied.

The undisputed fact is that Mayor Curtatone authorized a specific person - Kevin Cullen - to speak with and record him. Curtatone and Cullen were to be the two parties to the conversation. Curtatone never authorized Kirk Minihane to speak with him and record him or otherwise hear his conversation with anyone. Minihane thus was never "a person given prior authority" to hear and record his telephone conversation. Indeed, as Minihane well knew and has acknowledged, had he properly identified himself, Curtatone would never have consented to Minihane speaking with, much less recording him.

Moreover, under Massachusetts law, if a party to a conversation knows it is being recorded and does not want to participate in it, that party can leave that conversation and thereby nullify any consent. Minihane's fraudulent behavior deprived Curtatone of this opportunity under the statute. Clearly, this was not a situation where Curtatone "went ahead" with a call after knowing he was speaking with Minihane and what he was about, in "apparent indifference to the

consequences." Contrast Bonanno, supra at 658-59. See generally Jackson, supra at 507.

Looking at all of the surrounding facts, as required, Minihane's fraud and misrepresentation invalidated any "consent" by Curtatone – explicit or implied.

c. Minihane's Recording Was Secret and Without Authority

The Supreme Judicial Court has noted that "the wiretap statute is framed largely in negative terms: surreptitious 'interception' of any 'oral communication,' by any person (private citizen or public official) is proscribed, except as specifically provided in a few narrow exceptions." Commonwealth v. Tavares, 459 Mass. 289, 296 (2011). "Surreptitious" means something done or acquired "in secret *or by improper means*" … "characterized by fraud or misrepresentation of the truth." Collins English Dictionary – Complete and Unabridged, 12th Ed. 2014 (emphasis added); https://www.vocabulary.com/dictionary/surreptitious ("Surreptitious" is conduct "marked by quiet and caution and secrecy; taking pains to avoid being observed" and that "with or marked by hidden aims or methods").

Minihane's conduct undeniably qualifies as "surreptitious," "clandestine," and "secret." He heard and recorded Curtatone's telephone conversation through improper means marked by hidden aims, having taken deliberate measures to conceal his identity. As far as Curtatone knew, his conversation was one with Kevin Cullen, a long-time acquaintance. Curtatone had no idea that Minihane, not Cullen, was a party to this conversation, let alone that he was recording it for his hidden purposes – i.e., as an agent of Barstool Sports. Through his deception and fraud, Minihane robbed Curtatone of the ability and opportunity to knowingly decline participating in a recorded conversation with him.

Minihane thus was a person who, without prior authority or consent, did secretly hear and did secretly record Curtatone's telephone conversation in violation of the statute. It would thwart the statute's public policy of protecting individual privacy if a person could employ deception and fraud and hide their identity and purpose in order to (1) hear the contents of a person's conversation with another person and (2) record that conversation.

d. Minihane Undeniably Did "Secretly Hear" Curtatone's Conversation in Violation of the Statute

The Wiretap Statute prohibits a person both from "secretly hear[ing]" or "secretly record[ing]" the contents of a communication. The statute does not define what it means to "secretly hear" or "secretly record" communications. But, it undeniably expressly prohibits two types of conduct – secret hearing "or" secret recording. This Court must construe each clause and phrase in the statute as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose,[12] which is the protection of privacy rights. See generally Commonwealth v. Gordon, 422 Mass. 816 (1996) ("It is apparent from the preamble that the legislative focus was on the protection of privacy rights….). Under statutory construction principles, the use of the word "or" is "almost always disjunctive." Encino Motorcars, LLC v. Navarro, 138 S.Ct. 1134, 1141 (2018). Here, that would mean there are two parts to the statute – secret hearing and secret recording. The "hearing" component of an unlawful interception under the

[12] Worcester v. College Hill Props., 465 Mass. 134, 139 (2013).

statute is of particular import here given that the context involved a telephone call, rather than an in-person or face-to-face communication.

The Defendants have not, and indeed cannot, argue that Minihane did not "secretly hear" Curtatone's telephone conversation with "Kevin Cullen." It was only via Minihane's deception that he was privy to what Curtatone considered as a telephone conversation with a friend, Kevin Cullen. Minihane well knew that Curtatone would not share his thoughts with him on the record and willingly be recorded by him. Minihane thus went to the extreme measures of identifying himself as a friend of Curtatone's, altering his voice to sound like him, and referencing a mutual friend of Curtatone and Cullen in order to "secretly hear" (in addition to and apart from to "secretly record") what Curtatone would relate to Cullen. This does not in any sense conform to the Wiretap Statute and it cannot be permitted.

CONCLUSION

In light of the foregoing, the Plaintiff respectfully requests that this Honorable Court **reverse** the decision and judgment of the Superior Court dismissing the Plaintiff's Complaint and allow this action to proceed.

Respectfully submitted,

Plaintiff,

Joseph A. Curtatone,
By his attorney,

/s/ Leonard H. Kesten

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Date: 07/20/2020

ADDENDUM

ADDENDUM
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JUDGMENT ON MOTION TO DISMISS

Trial Court of Massachusetts
The Superior Court

Michael A. Sullivan, Clerk of Court
Middlesex County

DOCKET NUMBER
1981CV01717

CASE NAME
Curtatone, Joseph A.
vs.
Minihane, Kirk et al

COURT NAME & ADDRESS
Middlesex County Superior Court - Woburn
200 Trade Center
Woburn, MA 01801

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
Minihane, Kirk
Barstool Sports

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Curtatone, Joseph A.

This action came on before the Court, Hon. Maureen Hogan, presiding, and upon review of the motion to dismiss pursuant to Mass. R.Civ.P. 12(b),

It is **ORDERED AND ADJUDGED:**

That the plaintiff Joseph A. Curatone's complaint be and hereby is dismissed.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
01/17/2020	X

Date/Time Printed: 01-17-2020 08:36:44

SCV083\ 03/2016

10

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2019-01717

JOSEPH A. CURTATONE

vs.

KIRK MINIHANE, individually, & another[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Joseph A. Curtatone, the Mayor of Somerville, Massachusetts ("Mayor Curtatone"), commenced this action against defendants Barstool Sports and its employee Kirk Minihane ("Minihane") (collectively, "defendants"), alleging that they violated the wiretap statute, G.L. c. 272, § 99, by procuring his consent to an audio recording through fraud. This case is before the court on the defendants' motion to dismiss. For the following reasons, the defendants' motion is **ALLOWED**.

BACKGROUND

For purposes of a motion to dismiss under Rule 12(b)(6), the court must accept as true all of the factual allegations in Mayor Curtatone's complaint and draw every reasonable inference in his favor. Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011).

Barstool Sports is a blog with a reputation for publishing crass content and using demeaning and derogatory language when referring to women. E.g., Complaint, pars. 7-9 & n.1. David Portnoy is the president of Barstool Sports.

[1] Barstool Sports

On May 29, 2019, the Boston Herald published an article that criticized the Boston Bruins and the National Hockey League for associating with Barstool Sports and specifically for distributing Barstool Sports promotional towels to attendees at the TD Garden prior to Game 2 of the Stanley Cup Finals. A second Boston Herald reporter questioned the Bruins' public relations staff about this association and requested comments.

On May 31, 2019, Mayor Curtatone issued a statement criticizing the Bruins' association *with Barstool* Sports, writing, "'As a fairly rabid sports fan one of the more regrettable things I've seen is the attempt to disguise misogyny, racism & general right-wing lunacy under a "sports" heading. Our sports teams & local sports fans need to push back to stress that's not for us. @NHLBruins #mapoli'." Complaint, par. 14. In response to Mayor Curtatone's statement, Barstool Sports launched an attack on the mayor and his family, accusing him of being a "professional" and "legitimate" criminal, and accusing his family of engaging in rape, extortion, stabbing, and arson. Complaint, pars. 16-17.

Minihane attempted to interview Mayor Curtatone by using his real name, but he was unsuccessful. Minihane then contacted City of Somerville employees and identified himself as Kevin Cullen, a reporter for the Boston Globe. Minihane spoke to the City of Somerville's Public Information Officer on June 5, 2019, identifying himself as Kevin Cullen, and asked to interview Mayor Curtatone. Mayor Curtatone agreed to an interview with Kevin Cullen, not knowing that Kevin Cullen was actually Minihane.

Minihane's telephone interview of Mayor Curtatone occurred on June 6, 2019. Minihane altered his normal speaking voice to sound like Kevin Cullen, and throughout the interview maintained the ruse that he was Kevin Cullen. Minihane asked Mayor Curtatone for his consent to record the interview, asking, "'I'm just going to record this so we have it, is that good?'"

Complaint, par. 30. Believing that he was speaking to Kevin Cullen, Mayor Curtatone agreed. Minihane also video recorded his side of the conversation.

Barstool Sports posted the recording of Minihane's interview with Mayor Curtatone on its blog. In the recording, Minihane bragged about having lied about his identity.

DISCUSSION

I. Standard of Review

A party moving to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) contends that the complaint fails "to state a claim upon which relief can be granted . . . ." "'While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions . . . .'" Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (ellipses and alteration in original), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). "'Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Id.* (ellipses and alteration in original), quoting Bell Atl. Corp., 550 U.S. at 555. At the pleading stage, then, the plaintiff must assert "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect the threshold requirement . . . that the plain statement possess enough heft to show that the pleader is entitled to relief." Id. (internal quotations and alterations omitted), quoting Bell Atl. Corp., 550 U.S. at 557.

II. Wiretap Statute

"[T]he wiretap statute[, G.L. c. 272, § 99,] is framed largely in negative terms: surreptitious 'interception' of any 'oral communication,' by any person (private citizen or public official) is proscribed, except as specifically provided in a few narrow exceptions."

Commonwealth v. Tavares, 459 Mass. 289, 296 (2011), quoting G. L. c. 272, § 99 C 1; see Commonwealth v. Rivera, 445 Mass. 119, 126 (2005) (noting that wiretap statute "bars all clandestine audio recording"). The statute expressly defines "interception" as the "secret[] record[ing] . . . [of] the contents of any . . . oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication . . . ." G.L. c. 272, § 99 B 4. "Any aggrieved person whose oral . . . communications were intercepted, disclosed or used . . . or whose personal or property interests or privacy were violated by means of an interception . . . shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person" actual damages, punitive damages, and attorney's fees. G.L. c. 272, § 99 Q.

Mayor Curtatone has alleged facts that plausibly suggest that Minihane recorded their telephone conversation, that Mayor Curtatone agreed to the audio recording, and that Minihane lied about his identity by informing Mayor Curtatone that he was Kevin Cullen of the Boston Globe. Mayor Curtatone argues that his consent was not valid because Minihane procured it by misrepresenting his identity. The defendants seek to dismiss the complaint on the basis that the audio recording was not "secret," thereby rendering the issue of consent irrelevant. The court agrees.

A recording is not secret if the individual has "actual knowledge of the recording[;]" the question of whether the recording was authorized, i.e., consented to, "arises only if there is a finding that the conversations were recorded secretly." Commonwealth v. Jackson, 370 Mass. 502, 507 (1976). In other words, consent, or "[p]ermission to record an interview is not required so long as the interviewee has actual knowledge of the recording." Commonwealth v. Alleyne,

474 Mass. 771, 785 (2016). To hold otherwise would "conflate[] two aspects of the definition of an interception under the statute, namely that it be (1) secretly made *and* (2) without prior authority by all parties." Commonwealth v. Boyarsky, 452 Mass. 700, 705 (2008) (emphasis added).

The facts plausibly suggest that Mayor Curtatone had actual knowledge of the recording of the telephone call. Consequently, the telephone call was not secret and, it follows, not an "*interception*" under G.L. c. 272, § 99 B 4. The question of whether Mayor Curtatone could meaningfully consent to the audio recording when he was unaware of Minihane's true identity is thus irrelevant. See Boyarsky, 452 Mass. at 705; Jackson, 370 Mass. at 507.

ORDER

For the foregoing reasons, the defendants' motion to dismiss is **ALLOWED** with prejudice.

Maureen B. Hogan
Justice of the Superior Court

DATE: January 15, 2020

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedUnconstitutional as Applied by Martin v. Gross, D.Mass., Dec. 10, 2018

Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title I. Crimes and Punishments (Ch. 263-274)
Chapter 272. Crimes Against Chastity, Morality, Decency and Good Order (Refs & Annos)

M.G.L.A. 272 § 99

§ 99. Interception of wire and oral communications

Currentness

Interception of wire and oral communications.--

A. Preamble.

The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.

The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities.

The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.

B. Definitions. As used in this section--

1. The term “wire communication” means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception.

2. The term “oral communication” means speech, except such speech as is transmitted over the public air waves by radio or other similar device.

3. The term "intercepting device" means any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication other than a hearing aid or similar device which is being used to correct subnormal hearing to normal and other than any telephone or telegraph instrument, equipment, facility, or a component thereof, (a) furnished to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business; or (b) being used by a communications common carrier in the ordinary course of its business.

4. The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.

5. The term "contents", when used with respect to any wire or oral communication, means any information concerning the identity of the parties to such communication or the existence, contents, substance, purport, or meaning of that communication.

6. The term "aggrieved person" means any individual who was a party to an intercepted wire or oral communication or who was named in the warrant authorizing the interception, or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception.

7. The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

8. The term "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses.

9. The term "judge of competent jurisdiction" means any justice of the superior court of the commonwealth.

10. The term "chief justice" means the chief justice of the superior court of the commonwealth.

11. The term "issuing judge" means any justice of the superior court who shall issue a warrant as provided herein or in the event of his disability or unavailability any other judge of competent jurisdiction designated by the chief justice.

12. The term "communication common carrier" means any person engaged as a common carrier in providing or operating wire communication facilities.

13. The term "person" means any individual, partnership, association, joint stock company, trust, or corporation, whether or not any of the foregoing is an officer, agent or employee of the United States, a state, or a political subdivision of a state.

14. The terms "sworn" or "under oath" as they appear in this section shall mean an oath or affirmation or a statement subscribed to under the pains and penalties of perjury.

15. The terms "applicant attorney general" or "applicant district attorney" shall mean the attorney general of the commonwealth or a district attorney of the commonwealth who has made application for a warrant pursuant to this section.

16. The term "exigent circumstances" shall mean the showing of special facts to the issuing judge as to the nature of the investigation for which a warrant is sought pursuant to this section which require secrecy in order to obtain the information desired from the interception sought to be authorized.

17. The term "financial institution" shall mean a bank, as defined in section 1 of chapter 167, and an investment bank, securities broker, securities dealer, investment adviser, mutual fund, investment company or securities custodian as defined in section 1.165-12(c)(1) of the United States Treasury regulations.

18. The term "corporate and institutional trading partners" shall mean financial institutions and general business entities and corporations which engage in the business of cash and asset management, asset management directed to custody operations, securities trading, and wholesale capital markets including foreign exchange, securities lending, and the purchase, sale or exchange of securities, options, futures, swaps, derivatives, repurchase agreements and other similar financial instruments with such financial institution.

C. Offenses.

1. Interception, oral communications prohibited.

Except as otherwise specifically provided in this section any person who--

willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

Proof of the installation of any intercepting device by any person under circumstances evincing an intent to commit an interception, which is not authorized or permitted by this section, shall be prima facie evidence of a violation of this subparagraph.

2. Editing of tape recordings in judicial proceeding prohibited.

Except as otherwise specifically provided in this section any person who willfully edits, alters or tampers with any tape, transcription or recording of oral or wire communications by any means, or attempts to edit, alter or tamper with any tape,

transcription or recording of oral or wire communications by any means with the intent to present in any judicial proceeding or proceeding under oath, or who presents such recording or permits such recording to be presented in any judicial proceeding or proceeding under oath, without fully indicating the nature of the changes made in the original state of the recording, shall be fined not more than ten thousand dollars or imprisoned in the state prison for not more than five years or imprisoned in a jail or house of correction for not more than two years or both so fined and given one such imprisonment.

3. Disclosure or use of wire or oral communications prohibited.

Except as otherwise specifically provided in this section any person who--

a. willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception; or

b. willfully uses or attempts to use the contents of any wire or oral communication, knowing that the information was obtained through interception, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

4. Disclosure of contents of applications, warrants, renewals, and returns prohibited.

Except as otherwise specifically provided in this section any person who--

willfully discloses to any person, any information concerning or contained in, the application for, the granting or denial of orders for interception, renewals, notice or return on an ex parte order granted pursuant to this section, or the contents of any document, tape, or recording kept in accordance with paragraph N, shall be guilty of a misdemeanor punishable by imprisonment in a jail or a house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

5. Possession of interception devices prohibited.

A person who possesses any intercepting device under circumstances evincing an intent to commit an interception not permitted or authorized by this section, or a person who permits an intercepting device to be used or employed for an interception not permitted or authorized by this section, or a person who possesses an intercepting device knowing that the same is intended to be used to commit an interception not permitted or authorized by this section, shall be guilty of a misdemeanor punishable by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than five thousand dollars or both.

The installation of any such intercepting device by such person or with his permission or at his direction shall be prima facie evidence of possession as required by this subparagraph.

6. Any person who permits or on behalf of any other person commits or attempts to commit, or any person who participates in a conspiracy to commit or to attempt to commit, or any accessory to a person who commits a violation of subparagraphs 1 through 5 of paragraph C of this section shall be punished in the same manner as is provided for the respective offenses as described in subparagraphs 1 through 5 of paragraph C.

D. Exemptions.

1. Permitted interception of wire or oral communications.

It shall not be a violation of this section--

a. for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of such communication, or which is necessary to prevent the use of such facilities in violation of section fourteen A of chapter two hundred and sixty-nine of the general laws; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

b. for persons to possess an office intercommunication system which is used in the ordinary course of their business or to use such office intercommunication system in the ordinary course of their business.

c. for investigative and law enforcement officers of the United States of America to violate the provisions of this section if acting pursuant to authority of the laws of the United States and within the scope of their authority.

d. for any person duly authorized to make specified interceptions by a warrant issued pursuant to this section.

e. for investigative or law enforcement officers to violate the provisions of this section for the purposes of ensuring the safety of any law enforcement officer or agent thereof who is acting in an undercover capacity, or as a witness for the commonwealth; provided, however, that any such interception which is not otherwise permitted by this section shall be deemed unlawful for purposes of paragraph P.

f. for a financial institution to record telephone communications with its corporate or institutional trading partners in the ordinary course of its business; provided, however, that such financial institution shall establish and maintain a procedure to provide semi-annual written notice to its corporate and institutional trading partners that telephone communications over designated lines will be recorded.

2. Permitted disclosure and use of intercepted wire or oral communications.

a. Any investigative or law enforcement officer, who, by any means authorized by this section, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents or evidence in the proper performance of his official duties.

b. Any investigative or law enforcement officer, who, by any means authorized by this section has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may use such contents or evidence in the proper performance of his official duties.

c. Any person who has obtained, by any means authorized by this section, knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any state or in any federal or state grand jury proceeding.

d. The contents of any wire or oral communication intercepted pursuant to a warrant in accordance with the provisions of this section, or evidence derived therefrom, may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

e. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this section shall lose its privileged character.

E. Warrants: when issuable:

A warrant may issue only:

1. Upon a sworn application in conformity with this section; and

2. Upon a showing by the applicant that there is probable cause to believe that a designated offense has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

F. Warrants: application.

1. Application. The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications. Each application ex parte for a warrant must be in writing, subscribed and sworn to by the applicant authorized by this subparagraph.

2. The application must contain the following:

a. A statement of facts establishing probable cause to believe that a particularly described designated offense has been, is being, or is about to be committed; and

b. A statement of facts establishing probable cause to believe that oral or wire communications of a particularly described person will constitute evidence of such designated offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense; and

c. That the oral or wire communications of the particularly described person or persons will occur in a particularly described place and premises or over particularly described telephone or telegraph lines; and

d. A particular description of the nature of the oral or wire communications sought to be overheard; and

e. A statement that the oral or wire communications sought are material to a particularly described investigation or prosecution and that such conversations are not legally privileged; and

f. A statement of the period of time for which the interception is required to be maintained. If practicable, the application should designate hours of the day or night during which the oral or wire communications may be reasonably expected to occur. If the nature of the investigation is such that the authorization for the interception should not automatically terminate when the described oral or wire communications have been first obtained, the application must specifically state facts establishing probable cause to believe that additional oral or wire communications of the same nature will occur thereafter; and

g. If it is reasonably necessary to make a secret entry upon a private place and premises in order to install an intercepting device to effectuate the interception, a statement to such effect; and

h. If a prior application has been submitted or a warrant previously obtained for interception of oral or wire communications, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof; and

i. If there is good cause for requiring the postponement of service pursuant to paragraph L, subparagraph 2, a description of such circumstances, including reasons for the applicant's belief that secrecy is essential to obtaining the evidence or information sought.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts establishing such probable cause are derived in whole or part from the statements of persons other than the applicant, the sources of such information and belief must be either disclosed or described; and the application must contain facts establishing the existence and reliability of any informant and the reliability of the information supplied by him. The application must also state, so far as possible, the basis of the informant's knowledge or belief. If the applicant's information and belief is derived from tangible evidence or recorded oral evidence, a copy or detailed description thereof should be annexed to or included in the application. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant or information and belief, with the source thereof, and reason therefor, specified.

G. Warrants: application to whom made.

Application for a warrant authorized by this section must be made to a judge of competent jurisdiction in the county where the interception is to occur, or the county where the office of the applicant is located, or in the event that there is no judge of competent jurisdiction sitting in said county at such time, to a judge of competent jurisdiction sitting in Suffolk County; except that for these purposes, the office of the attorney general shall be deemed to be located in Suffolk County.

H. Warrants: application how determined.

1. If the application conforms to paragraph F, the issuing judge may examine under oath any person for the purpose of determining whether probable cause exists for the issuance of the warrant pursuant to paragraph E. A verbatim transcript of every such interrogation or examination must be taken, and a transcription of the same, sworn to by the stenographer, shall be attached to the application and be deemed a part thereof.

2. If satisfied that probable cause exists for the issuance of a warrant the judge may grant the application and issue a warrant in accordance with paragraph *I*. The application and an attested copy of the warrant shall be retained by the issuing judge and transported to the chief justice of the superior court in accordance with the provisions of paragraph N of this section.

3. If the application does not conform to paragraph F, or if the judge is not satisfied that probable cause has been shown sufficient for the issuance of a warrant, the application must be denied.

I. Warrants: form and content.

A warrant must contain the following:

1. The subscription and title of the issuing judge; and

2. The date of issuance, the date of effect, and termination date which in no event shall exceed thirty days from the date of effect. The warrant shall permit interception of oral or wire communications for a period not to exceed fifteen days. If physical installation of a device is necessary, the thirty-day period shall begin upon the date of installation. If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide; and

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted; and

4. A particular description of the nature of the oral or wire communications to be obtained by the interception including a statement of the designated offense to which they relate; and

5. An express authorization to make secret entry upon a private place or premises to install a specified intercepting device, if such entry is necessary to execute the warrant; and

6. A statement providing for service of the warrant pursuant to paragraph L except that if there has been a finding of good cause shown requiring the postponement of such service, a statement of such finding together with the basis therefor must be included and an alternative direction for deferred service pursuant to paragraph L, subparagraph 2.

J. Warrants: renewals.

1. Any time prior to the expiration of a warrant or a renewal thereof, the applicant may apply to the issuing judge for a renewal thereof with respect to the same person, place, premises or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application therefor and any accompanying papers upon which it was issued. The application for renewal must set forth the results of the interceptions thus far conducted. In addition, it must set forth present grounds for extension in conformity with paragraph F, and the judge may interrogate under oath and in such an event a transcript must be provided and attached to the renewal application in the same manner as is set forth in subparagraph 1 of paragraph H.

2. Upon such application, the judge may issue an order renewing the warrant and extending the authorization for a period not exceeding fifteen (15) days from the entry thereof. Such an order shall specify the grounds for the issuance thereof. The application and an attested copy of the order shall be retained by the issuing judge to be transported to the chief justice in accordance with the provisions of subparagraph N of this section. In no event shall a renewal be granted which shall terminate later than two years following the effective date of the warrant.

K. Warrants: manner and time of execution.

1. A warrant may be executed pursuant to its terms anywhere in the commonwealth.

2. Such warrant may be executed by the authorized applicant personally or by any investigative or law enforcement officer of the commonwealth designated by him for the purpose.

3. The warrant may be executed according to its terms during the hours specified therein, and for the period therein authorized, or a part thereof. The authorization shall terminate upon the acquisition of the oral or wire communications, evidence or information described in the warrant. Upon termination of the authorization in the warrant and any renewals thereof, the interception must cease at once, and any device installed for the purpose of the interception must be removed as soon thereafter as practicable. Entry upon private premises for the removal of such device is deemed to be authorized by the warrant.

L. Warrants: service thereof.

1. Prior to the execution of a warrant authorized by this section or any renewal thereof, an attested copy of the warrant or the renewal must, except as otherwise provided in subparagraph 2 of this paragraph, be served upon a person whose oral or wire communications are to be obtained, and if an intercepting device is to be installed, upon the owner, lessee, or occupant of the place or premises, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. If the application specially alleges exigent circumstances requiring the postponement of service and the issuing judge finds that such circumstances exist, the warrant may provide that an attested copy thereof may be served within thirty days after the expiration of the warrant or, in case of any renewals thereof, within thirty days after the expiration of the last renewal; except that upon a showing of important special facts which set forth the need for continued secrecy to the satisfaction of the issuing judge, said judge may direct that the attested copy of the warrant be served on such parties as are required by this section at such time as may be appropriate in the circumstances but in no event may he order it to be served later than three (3) years from the time of expiration of the warrant or the last renewal thereof. In the event that the service required herein is postponed in accordance with this paragraph, in addition to the requirements of any other paragraph of this section, service of an attested

copy of the warrant shall be made upon any aggrieved person who should reasonably be known to the person who executed or obtained the warrant as a result of the information obtained from the interception authorized thereby.

3. The attested copy of the warrant shall be served on persons required by this section by an investigative or law enforcement officer of the commonwealth by leaving the same at his usual place of abode, or in hand, or if this is not possible by mailing the same by certified or registered mail to his last known place of abode. A return of service shall be made to the issuing judge, except, that if such service is postponed as provided in subparagraph 2 of paragraph L, it shall be made to the chief justice. The return of service shall be deemed a part of the return of the warrant and attached thereto.

M. Warrant: return.

Within seven days after termination of the warrant or the last renewal thereof, a return must be made thereon to the judge issuing the warrant by the applicant therefor, containing the following:

a. a statement of the nature and location of the communications facilities, if any, and premise or places where the interceptions were made; and

b. the periods of time during which such interceptions were made; and

c. the names of the parties to the communications intercepted if known; and

d. the original recording of the oral or wire communications intercepted, if any; and

e. a statement attested under the pains and penalties of perjury by each person who heard oral or wire communications as a result of the interception authorized by the warrant, which were not recorded, stating everything that was overheard to the best of his recollection at the time of the execution of the statement.

N. Custody and secrecy of papers and recordings made pursuant to a warrant.

1. The contents of any wire or oral communication intercepted pursuant to a warrant issued pursuant to this section shall, if possible, be recorded on tape or wire or other similar device. Duplicate recordings may be made for use pursuant to subparagraphs 2 (a) and (b) of paragraph D for investigations. Upon examination of the return and a determination that it complies with this section, the issuing judge shall forthwith order that the application, all renewal applications, warrant, all renewal orders and the return thereto be transmitted to the chief justice by such persons as he shall designate. Their contents shall not be disclosed except as provided in this section. The application, renewal applications, warrant, the renewal order and the return or any one of them or any part of them may be transferred to any trial court, grand jury proceeding of any jurisdiction by any law enforcement or investigative officer or court officer designated by the chief justice and a trial justice may allow them to be disclosed in accordance with paragraph D, subparagraph 2, or paragraph *O* or any other applicable provision of this section.

The application, all renewal applications, warrant, all renewal orders and the return shall be stored in a secure place which shall be designated by the chief justice, to which access shall be denied to all persons except the chief justice or such court officers or administrative personnel of the court as he shall designate.

2. Any violation of the terms and conditions of any order of the chief justice, pursuant to the authority granted in this paragraph, shall be punished as a criminal contempt of court in addition to any other punishment authorized by law.

3. The application, warrant, renewal and return shall be kept for a period of five (5) years from the date of the issuance of the warrant or the last renewal thereof at which time they shall be destroyed by a person designated by the chief justice. Notice prior to the destruction shall be given to the applicant attorney general or his successor or the applicant district attorney or his successor and upon a showing of good cause to the chief justice, the application, warrant, renewal, and return may be kept for such additional period as the chief justice shall determine but in no event longer than the longest period of limitation for any designated offense specified in the warrant, after which time they must be destroyed by a person designated by the chief justice.

O. Introduction of evidence.

1. Notwithstanding any other provisions of this section or any order issued pursuant thereto, in any criminal trial where the commonwealth intends to offer in evidence any portions of the contents of any interception or any evidence derived therefrom the defendant shall be served with a complete copy of each document and item which make up each application, renewal application, warrant, renewal order, and return pursuant to which the information was obtained, except that he shall be furnished a copy of any recording instead of the original. The service must be made at the arraignment of the defendant or, if a period in excess of thirty (30) days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty (30) days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed, at least thirty days before the commencement of the criminal trial, shall render such evidence illegally obtained for purposes of the trial against the defendant; and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

2. In any criminal trial where the commonwealth intends to offer in evidence any portions of a recording or transmission or any evidence derived therefrom, made pursuant to the exceptions set forth in paragraph B, subparagraph 4, of this section, the defendant shall be served with a complete copy of each recording or a statement under oath of the evidence overheard as a result of the transmission. The service must be made at the arraignment of the defendant or if a period in excess of thirty days shall elapse prior to the commencement of the trial of the defendant, the service may be made at least thirty days before the commencement of the criminal trial. Service shall be made in hand upon the defendant or his attorney by any investigative or law enforcement officer of the commonwealth. Return of the service required by this subparagraph including the date of service shall be entered into the record of trial of the defendant by the commonwealth and such return shall be deemed prima facie evidence of the service described therein. Failure by the commonwealth to make such service at the arraignment, or if delayed at least thirty days before the commencement of the criminal trial, shall render such service illegally obtained for purposes of the trial against the defendant and such evidence shall not be offered nor received at the trial notwithstanding the provisions of any other law or rules of court.

P. Suppression of evidence.

Any person who is a defendant in a criminal trial in a court of the commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom, for the following reasons:

1. That the communication was unlawfully intercepted.

2. That the communication was not intercepted in accordance with the terms of this section.

3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.

4. That the interception was not made in conformity with the warrant.

5. That the evidence sought to be introduced was illegally obtained.

6. That the warrant does not conform to the provisions of this section.

Q. Civil remedy.

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person--

1. actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1000, whichever is higher;

2. punitive damages; and

3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

R. Annual report of interceptions of the general court.

On the second Friday of January, each year, the attorney general and each district attorney shall submit a report to the general court stating (1) the number of applications made for warrants during the previous year, (2) the name of the applicant, (3) the number of warrants issued, (4) the effective period for the warrants, (5) the number and designation of the offenses for which those applications were sought, and for each of the designated offenses the following: (a) the number of renewals, (b) the number of interceptions made during the previous year, (c) the number of indictments believed to be obtained as a result of those interceptions, (d) the number of criminal convictions obtained in trials where interception evidence or evidence derived therefrom was introduced. This report shall be a public document and be made available to the public at the offices of the attorney general and district attorneys. In the event of failure to comply with the provisions of this paragraph any person may compel compliance by means of an action of mandamus.

Credits

Amended by St.1959, c. 449, § 1; St.1968, c. 738, § 1; St.1986, c. 557, § 199; St.1993, c. 432, § 13; St.1998, c. 163, §§ 7, 8.

Notes of Decisions (334)

M.G.L.A. 272 § 99, MA ST 272 § 99
Current through Chapter 87 of the 2020 2nd Annual Session

End of Document

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 16(k) OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Leonard H. Kesten, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12 point, 10½ characters per inch, and contains 29 total non-excluded pages.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on July 20, 2020, I have made service of this Brief and Appendix upon the attorney of record for each party, by the Electronic Filing System and email on:

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